Hon. Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. JEFFREY I. GREENSTEIN, CHARLES H. WILK, and MATTHEW G. KRANE, Defendants.	NO. CR08-296-RSM UNITED STATES' MOTION TO TAKE DEPOSITIONS **Noted: October 23, 2009**

I. INTRODUCTION

The United States of America hereby moves this Court for an order granting leave to take depositions of four witnesses in London, England, pursuant to Federal Rule of Criminal Procedure 15(a)(1). Jeffrey Greenstein, Charles Wilk and Matthew Krane are charged with offenses stemming from their involvement in a fraudulent tax shelter known as "POINT." Defendants purposefully implemented critical components of this scheme outside the United States utilizing the services of several foreign individuals including, Chris Donegan, John Staddon, Rajan Puri, and Martin Peters. These foreign individuals have personal knowledge of Defendants' offshore conduct.

Donegan, Staddon, Puri and Peters, who are all citizens and residents of the United Kingdom, have refused to voluntarily appear in the United States for trial. They have, however, consented to depositions in London. Their testimonies are essential to the government's case in chief and no other witness subject to this Court's subpoena power can provide comparable testimony. Having willfully chosen to conduct their offense in a

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foreign venue outside the scrutiny of U.S. regulators, Defendants should not now be permitted to use that circumstance as a further shield to hinder criminal prosecution. The circumstances in this case are, therefore, "exceptional," as provided for in Fed. R. Crim. P. 15(a)(1), and the failure to depose the foreign witnesses for use at trial would result in a miscarriage of justice.

II. FACTUAL BACKGROUND

A. The Fraudulent Tax Shelter

The essence of the charged fraudulent scheme is that Greenstein and Wilk knowingly designed and orchestrated a tax shelter built upon a series of fake transactions, and that they willfully attempted to deceive the IRS and others in order to obtain millions of dollars in fees and cheat the government out of hundreds of millions of dollars in taxes. Greenstein and Wilk marketed POINT through their firm, Quellos Customs Strategies, LLC, as an investment vehicle that happened to also provide U.S. investors with tax benefits. Written material disseminated by Quellos explained that a certain "offshore investment fund" owned shares of stock in well known, publicly-traded technology companies. Purportedly replicating a well known European investment strategy, the fund first, formed a number of partnership entities, known generically as Special Purpose Vehicles ("SPVs"); second, contributed into each SPV portions of the technology stocks that it owned; and third, caused each SPV to issue a "covered warrant" against their respective basket of stocks. Subsequently, the covered warrants were placed with a European "bank" that supposedly paid millions of dollars in premiums to the SPVs for the right under the warrant to purchase the stocks inside the SPV in five years at a set price. Once the warrants were thus placed and the premiums credited to the SPVs, the fund sought to sell the SPVs as a package to other investors. Quellos apparently only discovered this opportunity when the bank that had subscribed to the warrants approached them to market the SPVs to U.S. individuals.

According to Quellos, the SPVs were an attractive investment because the premiums from the covered warrants, coupled with the potential for a rise in the price of

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the stocks in the SPVs, could provide good returns. For a U.S. investor, the SPVs also presented a fortuitous tax savings opportunity. As explained by Quellos, the technology stocks in the SPVs had fallen significantly in value from the time the fund originally acquired them, resulting in substantial unrealized losses for the fund. Under certain circumstances prescribed by the tax code, a U.S. taxpayer who purchased the SPV from the fund could inherit the entirety of the unrealized losses. These unrealized losses could then be used by the U.S. taxpayer to offset gains from the sale of other appreciated assets that the taxpayer happened to own and wanted to sell. In other words, by purchasing the SPV and then mixing the losses from depreciated stocks with the gains from the appreciated assets, a U.S. taxpayer could avoid paying capital gains taxes. As a result of Quellos' marketing efforts, six individuals engaged in POINT and collectively attempted to avoid approximately $400 million in capital gains taxes.

The evidence will show, however, that the POINT story was complete fiction, willfully fabricated by Greenstein and Wilk to deceive the IRS. These magical transactions that purportedly offered attractive investment returns while at the same time providing hundreds of millions of dollars in tax savings were nothing but sham transactions based on false statements, fraudulent documents, secret agreements, and concealment of the truth. The "offshore investment fund" touted by Quellos as the independent genesis of POINT was not a bonafide fund at all but a shell corporation appropriated by Greenstein and Wilk for the sole purpose of implementing a tax shelter. Every action of this "fund" was directed by Greenstein and Wilk in a series of orchestrated steps, pre-ordained to provide the precise tax benefits desired by their clients. And each of these steps were documented with phony contracts, agreements, financial statements and accounting book entries that bore no relation to the economic substance of what actually occurred. For example, the "covered warrants" were documented through sham subscription agreements and book entry statements that on paper appeared to show the payment of millions of dollars in premiums by a bank to the SPVs. However, the Defendants well knew that no premiums were ever paid or were going to be paid by the

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subscribing bank. The Defendants also knew that the devalued "stocks" purportedly owned by the fund and contributed to the SPVs never existed in the first place. The hundreds of millions of dollars in losses that purportedly flowed from these stocks and claimed by taxpayers on their tax returns as genuine economic losses, were knowingly and willfully fabricated by the Defendants out of thin air through the execution of false contracts and misleading accounting book entries. These false and misleading documents were knowingly designed to create the impression that an entity owned stocks that had fallen in value whereas, in truth and fact, the entity owned nothing.

B. Role of Witnesses in the UK

The proof of Defendants' intentional deceit rests primarily with the testimonies of four prospective witnesses who all reside in England. Chris Donegan, John Staddon, and Rajan Puri are former employees of an entity known as European American Investment Group, or "Euram." Donegan, Staddon and Puri, at the direction of Greenstein and Wilk, provided the overseas execution services for each of the POINT transactions. Martin Peters is a chartered accountant. Peters provided accountancy services to Euram and had managerial responsibility for a variety of companies beneficially owned by an individual named Leon Brenner, including the shell company that played the role of the "offshore investment fund" in the POINT transactions.

During IRS's investigation of this case, each of these individuals, while refusing to come to the United States, consented to interviews in London. The interviews of Donegan, Staddon, Puri and Peters provided the government with eyewitness accounts of what the foreign entities and transactions that make up POINT actually consisted of.

Staddon and Puri also voluntarily provided to the government copies of critical emails with the Defendants and other communications -- evidence that neither Quellos nor any other U.S. witness had provided to any of the investigative bodies involved in this case. For example, Greenstein and Wilk are charged with conspiring to launder monetary instruments in connection with a scheme to pay a secret kickback to Matthew Krane. Krane, at the time, was the personal attorney for Haim Saban, one of the clients who

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participated in POINT. Krane advised Saban to purchase a POINT tax shelter. Staddon and Puri provided emails from Wilk's Quellos email address, in which Wilk discussed plans to establish an offshore bank account for the benefit of Krane, and the diversion of millions of dollars in fees that Saban paid to other entities to Krane. Despite a subpoena from the government requiring the production of such email communications, Quellos has to date not produced such emails. Four examples of emails provided by Staddon and Puri are attached as Exhibit A.

Furthermore, Staddon provided the government with a recording of a telephone conference call between himself, Donegan, Greenstein and Wilk that took place in February, 2000.[1] The recorded call contains direct evidence that Greenstein and Wilk engineered each step of the POINT transaction, including the actions of the so called "investment fund." The conversation confirmed that Greenstein and Wilk knew that the investment fund did not possess any real stock, that the lack of real stock would pose a problem for the IRS, and that clients and attorneys reviewing the transaction were, at the time, unaware of this critical fact. A draft transcript of the call is attached as Exhibit B. In sum, Staddon, Puri and Donegan are the only government witnesses who can lay the necessary foundation for the introduction of critical evidence and testify as to its content.

Based on the interviews and evidentiary materials, the government anticipates that the testimonies of these foreign individuals will further include the following:

1. Chris Donegan

Donegan first came to know Greenstein when he was employed with the Swiss Bank, UBS. UBS and Donegan worked with Greenstein and Quellos on a variety of tax shelters. Greenstein and Wilk developed the POINT concept sometime in 1999, and approached Donegan to assist them in executing the transaction. Donegan understood from the beginning that POINT was simply a vehicle to avoid tax and not a legitimate investment strategy. Donegan believed that in 1999, Greenstein and Wilk were looking

[1] Counsel for both Greenstein and Wilk are in possession of all evidence provided by these individuals to date, as well as all memoranda of interviews regarding these foreign individuals.

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for real depreciated assets to use as the source for offsetting losses in the POINT transaction. At some point, in late 1999 or early 2000, the search for real assets was abandoned and Greenstein and Wilk settled upon creating "synthetic," or fake, assets. By this time, Donegan had left UBS and joined the newly formed entity Euram, along with another former UBS colleague, John Staddon.

In February 2000, Donegan and Staddon participated in a telephone conference call with Greenstein and Wilk to discuss the steps required to execute POINT. Donegan, with the knowledge of Staddon, decided to record a portion of the call because they were concerned about possible civil liabilities stemming from POINT, and wanted assurances from Greenstein and Wilk that the nature of the transaction, including the synthetic nature of the stocks, would be made transparent to all relevant parties. Even after the call, Donegan continued to be confronted with incidents that indicated Greenstein and Wilk were being less than forthcoming to clients and advisors.

2. John Staddon

Staddon joined Euram from UBS in December 1999. He was introduced to POINT in late 1999 after he joined Euram.

Staddon's role in POINT was to understand the transaction, to determine the various agreements needed to document the steps in the transaction, and to assist in drafting such agreements. Staddon understood from Greenstein and Wilk that POINT was to be based on "synthetic" stocks and not any real stocks. Staddon, with the knowledge of Greenstein and Wilk, directed two Isle of Man shell entities to create a synthetic stock portfolio to be used as the offsetting losses for the POINT taxpayers. Rather than having a company acquire any real stocks, Staddon directed one Isle of Man shell entity called Jackstones Limited to simply sign a series of contracts purporting to sell another Isle of Man shell entity named Barnville Limited nearly $9 billion worth of publicly-traded technology stocks. Staddon then directed Barnville to simultaneously execute loan agreements with Jackstones, loaning the same "stocks" back to Jackstones in return for cash collateral exactly equal to the sales price of the stock. The simultaneous

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purchase and loan-back of the stocks eliminated the need to have any stocks or cash actually exchange hands. Staddon, however, knew that Jackstones never owned any technology stocks to sell in the first place and Barnville never possessed sufficient funds to pay for even a fraction of the stock portfolio. Once the synthetic portfolio was thus documented, Barnville took on the role of the POINT narrative's "offshore investment fund." According to Staddon, Barnville did not have any independent reason for doing what it did other than to be a vehicle for Quellos to implement its tax shelter strategy.

Staddon also assisted in drafting the documents by which the various POINT SPVs purportedly issued and placed covered warrants with a "bank" in return for millions of dollars in premiums. According to Staddon, the covered warrants were simply paper transactions with no economic substance and that Greenstein and Wilk were well aware of the fact. The bank that purportedly subscribed to the warrants was Euram itself, who had no intention or ability to actually pay the tens of millions of dollars due under the warrants' subscription agreements.

Finally, Staddon also had concerns about potential civil liabilities for implementing POINT, and sought repeated assurances from Greenstein and Wilk that they were being transparent to clients and their attorneys about the true nature of the transaction, including the fact that the loss stocks were all virtual. Despite that, Staddon confirmed upon review that Quellos' written marketing material explaining POINT, and the legal opinions describing POINT all contained false and misleading statements about the "offshore fund" and whether it possessed any real stocks.

3. Rajan Puri

Puri, also a former UBS employee, joined Euram in January 2000. He assisted Staddon in drafting and shepherding the necessary documents that comprised each step of the POINT transactions. Puri confirmed that the "offshore fund" in Quellos' POINT narrative was nothing more than an Isle of Man shell entity with no real assets, appropriated purely for the purpose of executing Quellos' tax shelter.

Puri also has personal knowledge of the movement of millions of dollars in fees

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paid by Haim Saban to an account at Euram Bank that was established for the benefit of Matthew Krane. Puri, at the direction of Wilk, introduced Krane to Euram bank in order for him to establish an offshore account in the name of a shell corporation. Also at the direction of Wilk, Puri assisted in diverting approximately $8 million in fees Saban believed he was paying another entity to Krane's account.

4. Martin Peters

Peters had a relationship with the Quellos firm prior to his involvement in POINT. In or about 1998, Peters administered, on behalf of an individual named Leon Brener, a number of offshore shell entities that were created and used by Quellos to implement a different tax shelter strategy executed by Quellos prior to the POINT transactions. A company owned by Leon Brener was paid by Quellos for the creation and use of these shell entities.

In early 2000, Peters informed the administrators of two separate Isle of Man shell entities, Jackstones Limited and Barnville Limited, that they would be used in implementing a new tax shelter strategy developed by Quellos. Peters explained that Leon Brener ultimately controlled both Jackstones and Barnville, knew Quellos, and approved the use of the companies for this purpose. Peters informed the two shell entities that they will need to engage in paper transactions with each other to create a "virtual" portfolio of stock.

Peters was also personally involved in negotiating the engagement of a UK based accounting firm to "audit" the stock positions that had been purportedly purchased by Barnville from Jackstones. These "audits" were used as proof for clients and ultimately the IRS that Barnville purchased stocks at the times and for values represented. Peters knows that the "audits" merely consisted of the accounting firm looking at the self serving contracts and the matching accounting entries that recorded the contracts. No independent verification was made by the accounting firm as to whether the stocks actually existed.

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III. ARGUMENT

Under Federal Rule of Criminal Procedure 15(a)(1), a court may authorize the deposition of a prospective witness "because of exceptional circumstances and in the interest of justice." Exceptional circumstances are found in instances "when the prospective deponent is unavailable for trial and the absence of the testimony would result in an injustice." *United States v. Sanchez-Lima*, 161 F.3d 545, 548 (9th Cir. 1998). Whether the absence of testimony would produce an injustice often hinges on the materiality of that testimony to the case. *See, e.g., Sanchez-Lima*, 161 F.3d at 548 (holding that Rule 15 depositions of defense witnesses should have been granted because their testimony supported defense theory of self-defense). "When a prospective witness is unlikely to appear at trial and his or her testimony is critical to the case, simple fairness requires permitting the moving party to preserve that testimony by deposing the witness -- absent countervailing factors which would render the taking of the deposition unjust." *United States v. Drogoul*, 1 F.3d 1546, 1552 (11th Cir. 1993).

While unavailability and materiality are, therefore, common factors a trial court may consider in granting or denying a Rule 15 deposition, the Ninth Circuit emphasized that Rule 15(a) "does not require any conclusive showing of 'unavailability' or 'material testimony'" before a deposition may be authorized. *United States v. Omene*, 143 F.3d 1167, 1170 (9th Cir. 1998). Ultimately, the court must exercise its discretion in determining from the particulars of each case, whether "due to exceptional circumstances it is in the interest of justice that the testimony of a prospective witness be taken and preserved for possible use at trial." *Id*.

A. UK Witnesses Are Unavailable for Trial

Witnesses who are beyond the subpoena powers of the United States and who refuse to voluntarily attend trial are considered "unavailable" for purposes of Rule 15 depositions. *See United States v. Medjuck*, 156 F.3d 916, 920 (9th Cir. 1998) (Canadian witnesses found unavailable for trial since they were beyond court's subpoena power and refused to voluntarily attend). The four prospective witnesses sought to be deposed by

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the United States -- Chris Donegan, John Staddon, Rajan Puri, and Martin Peters -- are each citizens of the United Kingdom and reside in England. *See* Declaration of Jeff Coopersmith, Counsel to John Staddon and Rajan Puri, attached as Exhibit C; Declarations of Don Buchwald, Counsel to Chris Donegan and Martin Peters, attached as Exhibit D. Because all four prospective witnesses are thus foreign nationals located outside the United States, they are beyond the subpoena powers of the Court. *See* 28 U.S.C. § 1783. On September 17, 2009, the United States Attorneys Office requested that each witness voluntarily appear at trial and offered to provide necessary accommodations. *See* Letters to Jeff Coopersmith and Don Buchwald, attached as Exhibit E. All four witnesses refused to voluntarily attend trial, but represented through their counsel that they will submit to depositions in England. *See* Declarations of Coopersmith and Buchwald. Donegan, Staddon, Puri and Peters are thus "unavailable" pursuant to Rule 15.

B. Failure to Grant Depositions Will Result in Injustice

The anticipated testimonies of the UK witnesses are highly material, going to the core of the contested issues at stake in this case, and their absence will result in the government's inability to present critical evidence of Defendants' intent to defraud. Greenstein and Wilk are charged with conspiring to defraud the IRS and their clients by implementing a tax shelter that consisted of fake transactions, including fake stock transactions. As evidenced by prior sworn statements of Jeffrey Greenstein himself, the defense will seek to contest such facts. On August 1, 2006, Greenstein testified before the Senate's Permanent Subcommittee on Investigations regarding POINT. The Subcommittee was investigating purveyors of offshore tax shelters, including Quellos. During the testimony, Greenstein refuted the Subcommittee's conclusion that, among other things, the stocks purportedly owned by the "offshore fund" never existed. Greenstein stated, "... the report erroneously characterizes book entry transactions as fake. Every day, trillions of dollars of securities, commodities, and Treasury obligations are traded on a book entry basis."

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But these "book entry transactions," thus acknowledged by Defense as being central to this case, were executed in the U.K. through the assistance of the very individuals that Defense now seek to preclude the government from presenting to the jury. The Defendants are well aware that no other government witness has the direct, personal knowledge to testify about what actually occurred in these foreign transactions. In order for the jury to fully and fairly evaluate whether or not these foreign transactions were shams, the government must have the ability to present the testimonies of Donegan, Staddon, Puri and Peters.

In addition, Donegan, Staddon and Puri are the government's only source for authenticating and providing the necessary foundation for critical emails involving the Defendants, and other evidence regarding the POINT transaction -- evidence that the Defendants are well aware were never produced by any U.S. based source. Donegan, Staddon and Puri are the only government witnesses able to testify as to critical email communications and telephone calls with the Defendants that provide direct evidence as to Defendants' knowledge and state of mind regarding the POINT tax shelter. Like the depositions upheld by the Eleventh Circuit in *Drogoul*, "'[t]he testimony of these [prospective witnesses] lies at the very core of the charges in the indictment, and its refutation the heart of the defense." 1 F.3d at 1554 (11th Cir. 1993).

The Defendants purposefully conducted portions of their offense overseas knowing that their clients and the IRS would have difficulty independently verifying such offshore activities. Their choice to conduct their activities offshore should not be permitted to be used as a weapon against the government's efforts to effectively present its criminal case.

C. <u>No Countervailing Factors Weigh Against the Granting of Depositions</u>

1. United States will consent to Defendants' presence at the depositions.

The conduct of the depositions in England will not interfere with Defendants' right to confrontation. Barring any changes in circumstances regarding Defendants' risk of flight, the United States anticipates that it will recommend that both Wilk and Greenstein,

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along with their respective counsel, be permitted to travel and personally attend the depositions.

2. Testimony will be preserved in a manner that will permit the jury to fully assess witnesses' demeanor and credibility.

If granted, the United States will seek to have each deposition videotaped as well as transcribed in order that the character and manners of each witness is preserved for the jury to see and hear. Furthermore, the United States will respectfully request that the Court personally attend the depositions in order to make contemporaneous evidentiary rulings on the record. The live presence of the Court will result in the preservation of testimony that will be immediately trial worthy, without lengthy and awkward post deposition hearings and editing to deal with objections and motions in limine.

IV. CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court grant leave to take pursuant to Fed. R. Crim P. 15(a), depositions of Chris Donegan, John Staddon, Rajan Puri, and Martin Peters.

DATED this 16th day of October, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s). I hereby certify that I have served the attorney(s) of record for the defendant(s) that are non CM/ECF participants via telefax.

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